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No. 99-816

IN THE

SUPREME COURT OF THE UNITED STATES

JUDITH M. KOENICK,

Petitioner,

v.

REGINALD M. FELTON, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR *AMICUS CURIAE* AMERICAN JEWISH CONGRESS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the mandatory, state-wide closure of all public schools in Maryland on "Good Friday" – without any secular or administrative basis – violate the establishment clause of the First Amendment as applied to the states through the Fourteenth Amendment?

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INTEREST OF *AMICUS*

The *American Jewish Congress* is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious interests of American Jewry.[1] It has a long-standing commitment to the integrity of the establishment and free exercise clauses of the First Amendment, having either represented one of the parties or filed briefs *amicus curiae* in most of the cases interpreting those First Amendment principles before this Court. The National Capital Region of the American Jewish Congress has been actively involved in many cases in the Washington, D.C. area implicating the significant constitutional issues presented by this case. It filed an *amicus* brief in support of Petitioner before the United States District Court for the District of Maryland, and also filed an *amicus* brief and participated in oral argument in support of Petitioner before the United States Court of Appeals for the Fourth Circuit. Through counsel, the parties have consented to the filing of this *amicus* brief. Letters of consent have been lodged with the Clerk.

REASONS FOR GRANTING THE PETITION

This Court has long recognized that the establishment clause requires the utmost vigilance against governmental endorsement of *any* religion – either on a practical or symbolic level – particularly when religious issues affect the nation's public schools. School children are especially susceptible to the influence of state and local government

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[1] Counsel for a party did not author this brief, in whole or in part. No person or entity other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

authority. Indeed, the Court recently granted *certiorari* in a case raising important establishment clause issues arising in the public school setting. *See Santa Fe Indep. Sch. Dist. v. Doe, cert. granted,* 68 U.S.L.W. 3325 (U.S. Nov. 15, 1999) (No. 99-62) (whether school policy permitting student-led, student-initiated prayer at football games violates the establishment clause). The question presented here requires the Court to determine the appropriate constitutional criteria applicable to state-sponsored holidays as well as the impact of this Maryland statute[2] on thousands of public school children who do not observe the solemn Christian holiday, Good Friday.

There is a clear split in the Circuits on these issues. The lower courts have traveled in conflicting and confusing directions as they attempt to construct the proper constitutional framework for determining whether statutes like Maryland's violate the establishment clause by mandating state public holidays for Good Friday – holidays for public schools, state governmental offices, public employment and other areas that affect the fabric of civic life. This Court must establish a clear, uniform set of criteria to guide the lower courts and the states as they consider the constitutionality of such holidays.

A. Maryland's Law Impermissibly Endorses Religion

Maryland's statute makes it easier for observers of Good Friday to practice their religion than for adherents of other religious denominations to practice theirs. On that basis the

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[2] *See* Md. Code Ann., Educ. § 7-103(c)(1)(iii) (providing for the closing of all public schools "[t]he Friday before Easter").

statute should be subject to strict scrutiny review. *See Larson v. Valente*, 456 U.S. 228, 246 (1982).

But quite apart from conferring a tangible advantage on some religious groups but not others, the statute is a profound symbol of the concert of "church" and "state." When a state undertakes no effort to substantiate *any* administrative or secular need for declaring a state-wide school holiday and, nonetheless, proceeds to close all of its schools on what may be the holiest of Christian holy days, there is ample reason to perceive the holiday as government sponsorship of a particular religion.

This Court's recent establishment clause jurisprudence has not diminished the longstanding recognition that "symbolic union[s] of government and religion" tread dangerously on First Amendment principles. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 392 (1985); *Agostini v. Felton*, 521 U.S. 203, 227 (1997). This danger is only heightened when dealing with young school children, for "[t]he symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice." *Ball*, 473 U.S. at 390; *see also Lee v. Weisman*, 505 U.S. 577, 592 (1992) ("there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools").

Here, of course, the Maryland statute does not literally inject religious practices "into" the public schools – rather, it mandates that all of the State's public school students take a holiday on Good Friday. This is certainly not the same circumstance that this Court has addressed in the past. *See, e.g., Engel v. Vitale*, 370 U.S. 421 (1962); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Wallace v. Jaffree*,

472 U.S. 38 (1985); *Edwards v. Aguillard*, 482 U.S. 578 (1987). However, the impressionability of "children in their formative years" operates with equal force whether the children are construing the meaning of what they are told to do in school *or the significance of when school will be closed. Ball*, 473 U.S. at 390. Thus, Jewish and other non-Christian students throughout Maryland are at risk of alienation – from other students, teachers and administrators – when the State mandates the closing of school for a religious holiday not observed by them. *Cf. Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) ("Government practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny."). Jewish parents can only speculate – given the lack of any secular or administrative basis – when their children ask why the State of Maryland *mandates* that their school must be closed for "Good Friday."

The Fourth Circuit's decision upholding the Maryland statute casts aside vital establishment clause principles. The Court of Appeals casually dismissed the need for a genuine (rather than a presumed) secular rationale for the Good Friday holiday, based merely on the fact that Maryland enacted this religious-based holiday in the 19th Century. The Court of Appeals apparently was satisfied that Maryland's mandate of a Good Friday school holiday has been on the books for over a century, and is now rooted into state calendars, holidays and practices. *See Koenick v. Felton*, 190 F.3d 259, 266 (4th Cir. 1999) (Good Friday has "been a part of the Montgomery County School Public School Calendar for 130 years [and] . . . become part of the school community's expectations and plans . . . ."). Apparently, the Court of Appeals has created a new rule of constitutional law: practices that would otherwise violate the establishment clause will pass constitutional muster based

only on the passage of time, political convenience or majority acquiescence.

Maryland's Good Friday holiday was, of course, not founded upon contemporary administrative considerations, but instead reflects the religious perspective of its 19th Century enactors. Lacking any secular or administrative justifications, the historical origins of Good Friday as a school holiday – which still govern Maryland today – undoubtedly are predicated on Good Friday's *religious* character. To ignore the obvious religious origins of the Good Friday school holiday makes a mockery of the principle that courts must "remain sensitive, especially in the public schools, to 'the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others.'" *Westside Community Bd. of Ed. v. Mergens*, 496 U.S. 226, 269 (1990) (Marshall, J., concurring) (quoting *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 627-28 (1989) (O'Connor, J., concurring in part and in judgment)). Because "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. . . [i]n no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing . . . what the Constitution sought to keep strictly apart." *McCollum v. Board of Education*, 333 U.S. 203, 231 (1948) (Opinion of Frankfurter, J.).

Even if Maryland's mandate of Good Friday as a school holiday is predominantly symbolic in nature, that symbolic embrace of this most solemn and important Christian holiday violates the establishment clause. The State of Maryland has placed its imprimatur on Good Friday in the eyes of its public school students and the rest of its citizens. It has determined – without regard to how many students and

school employees might be absent – that *all* school employees must take Good Friday as a day of paid leave, and that no students can attend school. By upholding the constitutionality of Maryland's law, the lower courts run afoul of this Court's admonition that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel*, 370 U.S. at 431.

B. Maryland Has Not Proffered A Secular Or An Administrative Basis For The School Closing Law

The establishment clause ensures that ours is *not* a Christian nation; rather, it is a pluralistic one, comprised of peoples of myriad faiths, beliefs and views. Jewish citizens, like other non-Christians, are deeply affected by laws, like Maryland's, that declare Good Friday a holiday for all of the State's public schools, without regard to valid secular or administrative reasons.

It is important to note that the American Jewish Congress is *not* offended by the idea that some or many public schools could be closed on Christian holidays, including Good Friday. What does offend is for a state to declare an important religious holiday a *public* school holiday without any evidence that the state's action is grounded on secular purposes.

Consistent with that principle, the handful of public schools around the nation that choose to close for the Jewish high holidays Rosh Hashanah and Yom Kippur – when they fall on schools days – may do so consistent with establishment clause principles when the closings are based

on documented patterns and empirically-based projections of student and teacher absenteeism. Maryland's statute lacks any such factual basis, and the litigation record below – particularly given the summary judgment stage at which the case was decided – similarly lacks documented support for the statute's *presumed* purpose.

It might seem odd that the constitutionality of closing all the public schools on Good Friday should turn on the results of an empirical study or other *bona fide* evidence to project student and teacher absenteeism. The establishment clause, however, requires such an undertaking. As with many other constitutional commitments, guarding against establishment clause violations necessitates a showing that government has acted for reasons other than religion. Here, requiring evidence to support Maryland's *post hoc* assertion of administrative need for closing all of the State's schools on Good Friday is the only way to protect the First Amendment rights of all Maryland's citizens who do not observe Good Friday. *Cf. Metzl v. Leininger*, 57 F.3d 618, 622 (7th Cir. 1995) (Although the "constitutionality of statutes is typically determined by reference to general considerations . . . , [i]t was the state's decision to pitch its defense on the infeasibility of keeping the schools open of Good Friday. The question of feasibility is not one that can be settled as a matter of first or general principles. It requires a showing of fact that the state has not attempted to make."). The trial court's grant of summary judgment, upholding the Maryland statute – and its affirmance on appeal – was based on a record that lacked such evidence. Accordingly, summary judgment clearly was an inappropriate vehicle for resolving this important issue. *Cf. Edwards*, 482 U.S. at 634 (Scalia, J., dissenting).

C. The Conflict Among The Lower Courts Warrants Review By This Court

In *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995), the Seventh Circuit invalidated an Illinois law[3] requiring the closing of all public schools on Good Friday.[4] Like Maryland's law, the Illinois statute designated Good Friday as a holiday for all public school students and teachers throughout the state.[5] In contrast to the Fourth Circuit here, the Seventh Circuit in *Metzl* found that the effect of Illinois singling out Good Friday for special recognition by its public schools impermissibly advanced religion:

> The state law closing all public schools on Good Friday makes the burden of religious observance lighter on Christians than on the votaries of other religions. The Christian does not have to absent himself from school on a school day, and so perhaps have to incur the

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[3] *See* 105 Ill. Comp. Stat. Ann. 5/24-2.

[4] The American Jewish Congress also participated in the *Metzl* case.

[5] The Maryland and Illinois statutes also identify Christmas and Thanksgiving as legal school holidays. While these days certainly have religious origins, the courts have observed that both Christmas and Thanksgiving have acquired significant non-religious components. *See Cammack v. Waihee*, 932 F.2d 765, 790 (9th Cir. 1991) (Nelson, J., dissenting) ("I find this equation of Good Friday with Christmas and Thanksgiving both distasteful to practicing Christians, who do not wish a serious day permeated by mirth and levity, and unsettling to adherents of other religions or nonreligious persons, who would not desire their secular celebrations of Thanksgiving and Christmas to be linked to a holiday they could not imagine honoring."); *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 633 (1989) ("The Easter holiday celebrated by Christians may be accompanied by certain 'secular aspects' such as Easter bunnies and Easter egg hunts; but it is nevertheless a religious holiday.") (O'Connor, J., concurring in part and in judgment).

> inconvenience of a make-up exam on a later day, as the observant Jew might have to do if his school district decided not to close for any Jewish holidays. . . . [T]he First Amendment does not allow a state to make it easier for adherents of one faith to practice their religion than for adherents of another faith to practice *their* religion . . . .

Id. at 621.

In addition to finding Illinois's statute "accorded special recognition to Christianity beyond anything . . . shown to be necessary to accommodate the religious needs of the Christian majority," *Id.*, the Seventh Circuit held that Illinois should carry the burden of proving the existence of a legitimate secular purpose for the Good Friday holiday. *Id.* at 622. As Chief Judge Posner explained, "[t]he existence of such a justification [for the Good Friday school closing law] is in the nature of a defense, and the burden of producing evidence in support of a defense is, of course, normally on the defendant." *Id.* Because Illinois "failed to show that its law closing the public schools *throughout the state* on Good Friday is necessary to prevent a wasteful expenditure of educational resources," the Court invalidated the state's Good Friday law as violative of the establishment clause. *Id.* at 623 (italics in original).

Not only do conflicts exist between the Fourth and Seventh Circuits regarding Good Friday public holidays, but the Seventh Circuit's own treatment of the issue is inconsistent. Despite the Seventh Circuit's holding in *Metzl* that Illinois's Good Friday school closing law violated the establishment clause, a different panel of the Seventh Circuit subsequently has held that Indiana's recognition of Good Friday as a holiday for state employees does not violate the establishment clause. *See Bridenbaugh v. O'Bannon*, 185

F.3d 796 (7th Cir. 1999). *Bridenbaugh* also is the subject of a petition for *certiorari* currently pending before this Court, No. 99-812.

The Fourth and Seventh Circuits have rendered fundamentally different rulings regarding the critical issue of who should bear the burden of proof in the these cases, as well as the ultimate constitutionality of such laws. Faced with contradictory rulings, the states and the nation's school systems need this Court's guidance regarding the appropriate standards and applicable burdens for ascertaining what role, if any, religious holidays may play in mandating state-wide public school closures.

CONCLUSION

The Petition for Writ of *Certiorari* should be granted.

Respectfully submitted,

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